

### **REMARKS**

Claims 1-7 and 9-10 are now pending in the application. Independent claim 1 is amended to include the features of dependent claim 8 and from the original specification as filed, including page 29, lines 11-22. Claim 8 is cancelled.

The Examiner is respectfully requested to reconsider and withdraw the rejections in view of the amendments and remarks contained herein.

### **Rejection for Obviousness-Type Double Patenting**

Claim 1 stands rejected on the ground of nonstatutory obviousness-type double patenting as allegedly unpatentable over claim 25 of Mitchell et al. (US 5,952,065) in view of Lee et al. (US 5,605,961). Applicants respectfully traverse this rejection.

Claim 1 is drawn to a gas-filled cushioning device that includes a first layer comprising a blend of at least one aliphatic thermoplastic polyurethane, at least one aromatic thermoplastic polyurethane, and at least one copolymer of ethylene and vinyl alcohol. Claim 25 from Mitchell in view of Lee fails to provide such a layer. In particular, the claim and Lee reference are silent with respect to providing an aromatic thermoplastic polyurethane in the first layer blend. Likewise, no reason based on the general knowledge in the art is provided by which a skilled artisan would modify Claim 25 of Mitchell in view of Lee to include such features.

As such, claim 1 is nonobvious and patentably distinct over claim 25 of Mitchell and Applicants respectfully request reconsideration and withdrawal of the rejection.

### **Rejection Under 35 U.S.C. 103 over Mitchell and Lee**

Claims 1-10 stand rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over Mitchell et al. (U.S. Pat. No. 5,952,065) in view of Lee et al. (U.S. Pat. No. 5,605,961). This rejection is respectfully traversed.

Independent claim 1 is amended to include features from dependent claim 8 and from the original specification as filed, including page 29, lines 11-22, so that the first layer blend includes at least one aromatic thermoplastic polyurethane. Mitchell and Lee are silent with respect to a layer having a blend of at least one aromatic thermoplastic polyurethane in addition to at least one aliphatic thermoplastic polyurethane and at least one copolymer of ethylene and vinyl alcohol. Also, Mitchell in view of Lee fails to appreciate particular blend percentages or the effects thereof on gas transmission rate; namely, there is no disclosure of providing up to about 50 wt. % of the aliphatic thermoplastic polyurethane component in the blend. Hence the present claims are not obvious.

To establish a *prima facie* case of obviousness, the combined prior art references must teach or suggest all the claim limitations. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). Or, if the references are missing claimed features, there must be some apparent reason either in the references or the general knowledge in the art by which to modify the references to include the missing subject matter. See *Id.* and *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740-41, 82 USPQ2d 1385, 1396 (2007). The apparent reason to combine or modify the references should be made explicit in order to facilitate review. *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. at 1740-41, 82 USPQ2d at 1396; and see *In re Kahn*, 441 F3d 977, 988, 78 USPQ2d 1329, 1336

(Fed. Cir. 2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning to support the legal conclusion of obviousness.”).

In this case, the combination of Mitchell and Lee fails to provide any disclosure relating to a layer blend that further includes at least one aromatic thermoplastic polyurethane. Moreover, no reason based on the knowledge in art is provided to overcome this deficit and the present references are therefore inadequate for a *prima facie* case of obviousness. In particular, the present rejection on page 7, lines 1-3 of the Office Action dated March 31, 2009, alleges that a first layer blend including aromatic thermoplastic polyurethane is illustrated in Mitchell at col. 9, lines 52-66. However, Applicant respectfully disagrees and notes that the cited passage of Mitchell instead discloses features relating only to the ethylene and vinyl alcohol in the copolymer of Mitchell's inner layer 30. The Examiner is respectfully requested to identify any instance or suggestion of using aromatic thermoplastic polyurethane in the inner layer blend of Mitchell.

In addition, present claims 1, 2, 6, and 9 include particular percentages relating to the blend of aliphatic thermoplastic polyurethane, aromatic thermoplastic polyurethane, and copolymer of ethylene and vinyl alcohol. These particular formulations are not within the scope of Mitchell, including Mitchell claim 25 as alleged in the Office Action dated March 31, 2009; i.e., disclosure of a genus (a mixture in Mitchell claim 25) does not necessarily include disclosure of certain species (particular percentages).

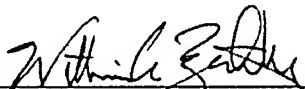
To wit, the present disclosure illustrates how specific percentages of TPU and EVOH blends affect the gas transmission rate (GTR), as reported in Table 1. As shown in the Table, where the EVOH component is 50% or more (i.e., the blend has up to about 50% of the aliphatic thermoplastic polyurethane, as presently claimed) the GTR can be reduced to one half of the GTR value of TPU alone; i.e., 14.01 versus 29.0. What is more, increasing the EVOH from 50% to 90% (50% to 10% aliphatic thermoplastic polyurethane, respectively) further reduces the GTR over seven-fold; i.e., 1.62 versus 14.01. Nowhere does Mitchell (or Lee) appreciate the particular effects of specific percentages of the blend components and the simple disclosure of the mixture in Mitchell (which is in any event deficient for the reasons above) does not provide for the presently claimed formulations. Namely, the reference combination does not appreciate using up to about 50 wt. % of the at least one aliphatic thermoplastic polyurethane in the first layer blend (as per present claim 1), the particular percentage ranges of found in claims 2 and 6, much less the addition of aromatic thermoplastic polyurethane (in claim 1) and the percentage ranges found in claim 9. Accordingly, the combination of Mitchell and Lee cannot support a *prima facie* of obviousness.

Applicants respectfully request reconsideration of the claims and withdrawal of the rejection.

CONCLUSION

It is believed that all of the stated grounds of rejection have been properly traversed, accommodated, or rendered moot. Applicant therefore respectfully requests that the Examiner reconsider and withdraw all presently outstanding rejections. It is believed that a full and complete response has been made to the outstanding Office Action and the present application is in condition for allowance. Thus, prompt and favorable consideration of this amendment is respectfully requested. If the Examiner believes that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at (248) 641-1600.

Dated: June 16, 2009

By:   
William A. Ziehler, Reg. No. 61,415  
Anna M. Budde, Reg. No. 35,085

HARNESS, DICKEY & PIERCE, P.L.C.  
P.O. Box 828  
Bloomfield Hills, Michigan 48303  
(248) 641-1600

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